# UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK

MARK D'ANDREA, Plaintiff v. INCAPTURE INVESTMENTS LLC, PETER KNEZ, and INCAPTURE LP Defendant(s)	))))))))))	Civil Action No.

COMPLAINT

1. The plaintiff ("D'Andrea") is a citizen and domiciliary of the State of Rhode Island. Defendant Incapture Investments LLC (sometimes referred to as the "Employer") is, on information and belief, a Delaware Limited Liability Company, doing business in New York, with its principal place of business in New York or in California (at different times). Defendant Peter Knez ("Knez") is, on information and belief, a citizen and domiciliary of the State of California. Defendant Incapture LP is, on information and belief, a Delaware Limited Partnership, doing business in New York, with its principal place of business in New York or California.

2. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

2. "Incapture" was created by Knez as a conceptual or "start-up" entity, without operations, in early 2012.

3. Commencing in March of 2012, Knez began negotiations with D'Andrea, who was then employed elsewhere, seeking to induce him to join Incapture. Knez and D'Andrea had previously been employed by the same entity. Knez advised D'Andrea that he was personally providing adequate financing for Incapture.

4. On or about November 2, 2012, Knez hired D'Andrea to be Global Head of Business Development of Incapture, LLC, pursuant to a certain Personal Services Agreement. On or about the same date, D'Andrea and Incapture, LLC entered into a certain Partnership Agreement and a Supplemental Agreement.

5. On or about March 1, 2013, D'Andrea learned that Knez had not personally provided sufficient funding in order to carry the company from start-up through the launch of a flagship investment fund (a "hedge fund"). Because of Knez' failure to have provided sufficient funding, several key initiatives were delayed until after Incapture, LLC secured a commitment to an investment of $10,000,000.00 in operating capital from a certain Robert E. Diamond, Jr. ("Diamond"), in July of 2013.

6. In return for his investment of $10,000,000, Diamond became non-executive Chairman of Incapture, LLC, and received new Units representing 20 percent of Incapture LLC, at an agreed-upon paper valuation of the company of $50,000,000. The issuance of these additional Units caused dilution that reduced the value of the other equity holdings, including the fourteen percent (14%) equity position previously granted to D'Andrea by Knez.

7. Upon the closing of this investment, on or about October 22, 2013, Incapture LLC was reorganized as a Delaware Limited Partnership named Incapture LP. Diamond, through his vehicle, Acapture LLC, became one of the two Managing Members (general partners) of Incapture LLC, the other Managing Member (general partner) being Incapture GP, LLC, through its Managing Member, an entity named Encapture LLC, owned by Knez. Thus, indirectly, Diamond and Knez managed Incapture LP, the controlling entity of various Incapture affiliates.

8. Also on or about October 22, 2013, D'Andrea entered into a Restated Personal Services Agreement with Incapture Investments LLC, replacing the previous Personal Services

Agreement. (A copy of the Restated Personal Services Agreement, the "Personal Services Agreement," is attached as Exhibit 1 and incorporated by this reference) On or about December 16, 2014, in anticipation of additional fundraising, D'Andrea was asked to enter into a Second Amended and Restated Personal Services Agreement with Incapture Investments LLC. D'Andrea does not know whether or not this agreement was ever fully-executed. (An unexecuted copy of the Second Amended and Restated Personal Services Agreement is attached as Exhibit 2 and incorporated by this reference.)

9. In all of the Personal Services Agreements, Incapture, LLC agreed to pay D'Andrea an annual base salary, called a Services Fee, of $250,000, plus an annual bonus that could not exceed $5,000,000.

10. Bothe Exhibit 1 and Exhibit 2 contain the following "termination" provision:

> *Termination.* Upon termination of this Agreement for any reason D'Andrea shall be entitled to receive: (i) the unpaid portion of the Services Fee (as defined in Section 3.a below) through the date of termination, (ii) reimbursement for any unpaid Business Expenses (as defined in Section 3.c below), and (iii) provided D'Andrea has not been terminated for Cause and/or has not violated any of the restrictive covenant provisions of the Supplemental Agreement attached as Exhibit B, the Service Fee until the earlier to occur of (y) a date which is one year from the date of D'Andrea's date of termination, and (z) the date D'Andrea commences working for any third party entity whether as a consultant or employee.

11. "Cause" is limited in the Personal Services Agreements to any one of six specified types of heinous conduct. In addition, the Personal Services Agreements required the Employer to provide D'Andrea with 90 days' notice of termination, during which D'Andrea would receive pro rata his base salary. Thus, in the event of termination by the Employer without cause, D'Andrea would receive a termination payment of $312,000.

12. As an incentive to D'Andrea to leave his previous employment, the Personal Services Agreements included the following provision regarding "Deferred compensation":

> *Deferred Compensation.* D'Andrea will be entitled to deferred compensation (the "Deferred Compensation") to compensate him for his unvested or forfeitable interests in any stock or benefits that D'Andrea forfeited to join the Company. The Deferred Compensation shall be calculated as of the Effective Date and shall be based on D'Andrea's actual documented loss not to exceed Two Million Five Hundred Thousand Dollars ($2,500,000). D'Andrea will be required to submit appropriate documentation of his loss prior to the receipt of payment. The Deferred Compensation shall be payable in cash on January 1, 2016, unless one of the following events has occurred: (i) D'Andrea has been terminated for Cause (as defined in Section 2.a above); (ii) D'Andrea has resigned; or (iii) D'Andrea has given notice of intent to resign. The Deferred Compensation shall be subject only to the aforementioned conditions. The viability, status or existence of the Company shall have no bearing on the payment of Deferred Compensation, and payment of the Deferred Compensation shall be personally guaranteed by Peter Knez, CEO of the Company. A copy of such guarantee is attached as Exhibit A hereto.

13. As an additional employment incentive, the Personal Services Agreement provided for D'Andrea to enter into a Partnership Agreement and a Supplemental Agreement at the time of his original employment, which Agreements provided him with equity in Incapture, LLC, subject to vesting. With the October 22, 2013 reorganization of Incapture, LLC as Incapture LP, and the investment by Diamond, the Limited Partnership Agreement was reformed on that date as the Amended and Restated Limited Partnership Agreement (incorporated herein as Exhibit 3 to this Complaint, without including the list of investors), and it remained amended, supplemented, and modified by a revised Supplemental Agreement with Incapture, LP, in letter form (incorporated herein as Exhibit 4 to this Complaint).

14. In September of 2013, in connection with the Diamond investment referred to in paragraphs 5 and 6, Knez unilaterally, disproportionately reduced D'Andrea's percentage from 14 percent to 6.25 percent. D'Andrea's percentage ownership was thereafter reduced again on multiple occasions, so that Incapture LP's records most recently reflect D'Andrea's entitlement to Units representing only 3.4 percent of the equity of Incapture LP. With the passage of time, D'Andrea's Units became partially vested, and were to become fully-vested on November 2, 2015, absent termination for Cause, subject to further dilution only in two specified circumstances.

Rights to tender the Units for purchase under certain circumstances were also granted to D'Andrea under these Agreements.

15. As a final employment incentive, Knez, who at all relevant times was CEO of Incapture Investments LLC., as well as the principal of one of the two Managing Members of the parent limited partnership, gave D'Andrea a Personal Guarantee (hereinafter the "Personal Guarantee") of the performance of all of the employment obligations of Incapture Investments LLC. The Personal Guarantee is appended to Exhibit 1.

16. The "Personal Guarantee" contains the following language:

> The parties agree that the prevailing party will be liable for any collection costs or costs of suit, including reasonable attorneys' fees incurred or expended by employee in order to enforce this Guaranty.

17. At no time during his employment was D'Andrea advised by Knez, or by any other responsible employee or agent of any Incapture entity, including any Human Resources Department employee, that his work was in any way deficient. At no time was he instructed to change any aspect of the performance of his duties or to develop any personal improvement plan.

18. As a result of the previous need to await the funding eventually supplied by Diamond, the flagship investment fund (hedge fund) launch date was delayed from 2013 to May, 2014.

19. Following the receipt of funding from Diamond and the reorganization of Incapture in October of 2013, Knez expanded the Employer's headcount, growing it from ten (10) to thirty (30) people by the end of 2013. During 2014 and the first part of 2015, he grew the headcount to over seventy (70) employees.

20. In addition, during the twenty-four (24) month period following the receipt of funding from Diamond, Knez opened a new headquarters office in San Francisco, the location of his personal domicile, as well as offices in London, Tokyo, Sydney, and Walnut Creek, CA.

21. Also in October of 2013, with the receipt of operating funding and with the forthcoming launch of the fund in 2014, D'Andrea anticipated spending a significant percentage of his upcoming professional time making presentations to prospective clients, located in various places remote from any Incapture office. Given Incapture's evolving culture of having talent working from multiple locations, and with Knez commuting between New York and San Francisco, D'Andrea suggested to Knez that D'Andrea should be allowed to work remotely from his Jamestown, RI home. Knez agreed. Thereafter, D'Andrea expensed the cost of hotels when working from the New York office of Incapture Investments LLC, and was repaid by Incapture Investments LLC in every instance other than the month of termination.

22. In 2014, as a consequence of the aggressive recruitment of BlackRock employees by Knez, BlackRock, a competitor, threatened Incapture Investments LLC with litigation, and Incapture Investments LLC consented to pay BlackRock $2,000,000 to settle the matter. As part of this settlement, D'Andrea was prohibited from contacting several of his former clients. This settlement and the resulting prohibition directly and adversely impacted D'Andrea's ability to attract new investments in the hedge fund.

23. As a consequence of the above-described management activities by Knez, Incapture again became under-funded. In March of 2014, Incapture LP closed on a third equity financing of $23,000,000. This equity round was done at a $100,000,000 company valuation. The new investors were individuals recruited by Diamond. No institutional investors participated.

24. In May of 2014, Incapture Investments LLC launched the Alpha Capture Fund, its flagship hedge fund, with an initial investment of $50,000,000. A small percentage of this money had been invested by employees, but most of it came from non-institutional investors, introduced by Diamond.

25. On July 1, 2014, four new institutional clients, all based in Australia, invested an additional $150,000,000 into the Alpha Capture fund.

26. Leading up to the May, 2014 launch of the Alpha Capture Fund launch, D'Andrea and his team introduced the firm to more than seventy-five (75) large, sophisticated institutional investors in multiple countries, with a focus on North America, Australia, Japan, Europe and the United Kingdom (Great Britain).

27. From launch date (May, 2014) until the date when it ceased operations (July 31, 2015), the Alpha Capture Fund's performance was negative by approximately 3.5 percent, with the low point in April 2015, when it was negative 5 percent. Due to this poor investment performance, Knez made the decision to cut fees to zero, as an incentive to investors to keep their assets in the fund. The waiver of fees amounted to a cutoff of fee-based revenue, thereby severely straining Incapture's finances.

28. By the end of 2014, many actual and potential institutional clients had voiced increased concerns that the business risk of investing in an underfunded managing entity was increasing as investment performance was worsening. Clients began to wait and see how the firm financials and investment results would develop, and they deferred investments. It became virtually impossible for D'Andrea, or anyone, to obtain investment commitments from new investors.

29. At the end of the June 2015 quarter, clients began to demand the redemption of their investments. Over the next month, assets under management fell from $200,000,000 to $150,000,000. At that time, Diamond redeemed his personal $5,000,000 investment and put it into operating capital, to help keep the firm afloat. Two of the four institutional clients redeemed in June.

30. Commencing in the first quarter of 2015, Incapture attempted to raise a fourth round of operating capital, seeking $60,000,000. Diamond and Knez led the "roadshow" (series of presentations to potential investors), and were supported by an investment banking company. They made detailed financial presentations to fifty (50) firms, both private equity and venture capital firms. However, by this time the monthly fixed costs for the total of rent, other non-salary expenses and over seventy (70) salaries (the "burn rate") amounted to $2,000,000 per month. Based upon the firm's fee structure, the firm would have needed to have approximately $2,000,000,000 (two billion dollars) under management for it to have reach break-even. No institutional firms invested in Incapture in response to the roadshow.

31. In July of 2015, Incapture Investments LLC made the decision to wind down all of the Alpha Capture Fund investments, and to close the fund. All capital was returned to investors. Virtually all Incapture Investments LLC employees were terminated. After firm-wide layoffs in July, only three employees, plus D'Andrea, were retained.

32. No additional operating capital was obtained between July and mid-September, 2015.

33. On or about September 17, 2015, D'Andrea received a letter from Knez, dated September 15, 2015, terminating his employment, allegedly for Cause. The conduct allegedly constituting "Cause" was not specified.

34. The deliberate mischaracterization of the ground for termination was a pretext by Incapture Investments LLC and by Knez personally. The allegation was and remains false and defamatory. The termination was done with deliberate bad faith and with malice.

35. Incapture Investments LLC terminated D'Andrea in an attempt to avoid having to make its contractually-required payments in the event of a termination for any reason other than

Cause.

36. The termination constituted a breach by Incapture Investments LLC of the Personal Services Agreement with D'Andrea.

37. D'Andrea has documentable losses on assets forfeited upon his acceptance of employment with Incapture of $2,500,000.

38. D'Andrea remains unemployed, in part at least because of the defamatory allegation that he had been terminated for cause.

39. On October 16, 2015, D'Andrea demanded in writing that the Employer honor its contractual commitments as described herein, but it failed to do so.

40. On November 2, 2015, D'Andrea demanded in writing that Knez honor his obligations as guarantor, but he failed to do so.

41. As a result of their respective breaches, as aforesaid, the Employer and Knez have caused D'Andrea to incur the following damages: $312,000 in salary, representing salary during the 90 day notice period and the subsequent one year, plus $2,500,000 in deferred compensation, plus Units representing at least 3.4 percent of the equity of Incapture LLC, plus damages in an amount to be determined for defamation.

42. WHEREFORE, plaintiff, Mark D'Andrea, demands (1) judgment against the defendants, Incapture Investments LLC and Peter Knez, for at least $2,812,000 because of their breaches of his contracts with them, plus interest and costs, plus judgment against Peter Knez for attorneys' fees and the other costs of this suit, in an amount to be determined; (2) judgment against defendants in an amount to be determined because of their defamation of plaintiff; (3) a declaratory judgment establishing the right of Mark D'Andrea (a) to immediate receipt of Units representing at least 3.4 percent of the equity of Incapture LP, or such other percentage as the Court shall

determine he is entitled to, and (b) to tender those Units in exchange for payment of the value thereof; and (4) for such other and further relief as this Court may deem to be appropriate in the circumstances.

Date: November 18, 2015

S / William R. Bronner
William R. Bronner
Attorney at Law
294 Vanderbilt Avenue
Brooklyn, NY 11205
WRBronner@gmail.com
718 789 6763, 914 282 5157 (mobile)